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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE,

Petitioner,

v.

CASPAR WEINBERGER, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Diane Place, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceedings on May 15, 1974.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is reprinted in 7 EPD ¶9367 and in the Appendix hereto, *infra,* at pp. 11a-17a. The opinion of the District Court, which is not reported, is reprinted in 6 EPD ¶9010, and is set out in the Appendix hereto, *infra,* at pp. 1a-10a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Did the District Court have jurisdiction to remedy discrimination in employment on the basis of sex by the United States, where the discrimination was alleged to have occurred prior to March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972?

Statutory Provisions Involved

Section 717(a) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(a), provides:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(c), provides:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred

to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 7151, 5 U.S.C., provides:

> It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

Section 1 of Executive Order 11478 provides:

> It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and

agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Statement of the Case

Petitioner is a female employee of the Food and Drug Administration of the Department of Health, Education and Welfare. Petitioner, who is presently a GS-12, has not been promoted for 7 years.

On September 24, 1971, petitioner filed a formal complaint with the Equal Employment Opportunity officer alleging that she had been discriminated against because of her sex. The administrative complaint was denied, and on August 15, 1972, that denial was affirmed by the Board of Appeals and Review of the United States Civil Service Commission. This action was commenced on September 13, 1972, in the United States District Court for the Eastern District of Michigan.

Petitioner's complaint alleged that the defendant officials had discriminated against her in that, solely because of her sex, they had denied her a promotion to which she was lawfully entitled, refused to upgrade the job classification for the work she was doing, denied her training and counseling necessary for promotion, and interfered with her efforts to obtain additional training by denying her leave time or compensation to take job related college courses. The complaint alleged that similarly situated male employees of the Food and Drug Administration were promoted beyond a GS-12, and provided with training and educational assistance which were denied to women employees generally

and petitioner in particular. The complaint further asserted that petitioner had been the victim of retaliation because she had filed an administrative complaint.

The Civil Service Commission statistics reveal that, as of October, 1972, women constituted 58.0% of the white collar employees of the Department of Health Education and Welfare, but only 16.9% of the GS-13 employees, and an even smaller proportion of employees with higher GS ratings. Among the lowest paid agency employees, women were over 80% of all employees under GS-7.[1] During the previous six years, while petitioner was locked into her GS-12 rating unable to obtain promotion, the proportion of GS-13 employees who were women actually *declined*. In 1966 women had constituted 19.1% of that group.[2]

Jurisdiction over petitioner's action was asserted to exist by virtue of the 1972 amendments to Title VII of the 1964 Civil Rights Act. Although Title VII as originally enacted had excluded federal employees from its coverage, Congress in 1972 had added section 717(c), which expressly authorized private civil litigation by federal employees aggrieved by discrimination on the basis of sex, race, religion, or national origin. The effective date of this amendment was March 24, 1972, six months before the filing of the instant action. Jurisdiction was also founded upon several other provisions, including the Tucker Act, 28 U.S.C. §1346, and Executive Order 11478.

The United States moved to dismiss the action for lack of jurisdiction, arguing that section 717(c) only created

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[1] Federal Civilian Employment: Women, 1972 Study, p. 36, Table I-C.

[2] Study of Employment of Women in the Federal Government, 1968.

a cause of action for unlawful discrimination which occurred after the effective date of the 1972 amendments. The government did not deny that discrimination on the basis of sex was illegal prior to March 24, 1972, but urged that no statute enacted prior to section 717(c) gave federal employees any right to remedy such illegality. Petitioner maintained that such a cause of action existed prior to the enactment of section 717(c), and that that amendment to Title VII, since it created no new substantive right but merely augmented the procedural remedies, should be applied to all claims of discrimination still pending on March 24, 1974.

On July 5, 1973, the District Court granted the government's motion to dismiss, and the Court of Appeals for the Sixth Circuit affirmed that decision on May 15, 1974.

Reasons for Granting the Writ

As this Court recognized in *Reed* v. *Reed,* 404 U.S. 71 (1971), government action which arbitrarily discriminates between two persons similarly situated solely because of their sex is constitutionally impermissible. That principle is of particular importance when the treatment of federal employees is at stake, for in such cases discrimination affects adversely not only the victimized employee, but also the efficiency of the national government which fails to draw fully upon the skills of its workers and needlessly offends the sensibilities of those with whom it must deal. Compare *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

Despite these principles, discrimination on the basis of sex, like discrimination based on race, has a long history in the federal government. For the first century of our country's existence female employees were virtually un-

known in the federal service. Not until the Classification Act of 1923 did Congress require that women and men be paid the same wages for equal work. Only in 1962 did Congress repeal the last of the nineteenth century laws which countenanced promoting only men to the higher grades. United States Civil Service Commission, Study of Employment of Women in the Federal Government, 1968, pp. 1-2. In 1966 Congress established it to be the national policy that all federal employees should be afforded the same employment opportunities without regard to sex. 5 U.S.C. §7151. In 1967 the Executive Orders which a generation earlier had prohibited discrimination on the basis of race were amended to condemn as well discrimination on the basis of sex. Executive Order 11375.

Five years later Congress concluded that neither section 7151 nor Executive Order 11375 had succeeded in eradicating discrimination on the basis of sex or race in Federal employment. The House Committee on Education and Labor[3] and the Senate Committee on Labor and Public

[3] "The disproportionate distribution of minorities and women throughout the federal bureaucracy and their exclusion from higher policy making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity." H. Rep. No. 92-238, 92nd Cong., 1st Sess. p. 23.

Welfare[4] found that the vast majority of the female and minority employees were restricted to the lowest federal grades. In the years since Congress had mandated equal employment opportunities by enacting §7151, the proportion of women in higher paid and supervisory positions had not

[4] "Statistical evidence shows that minorities and women continue to be denied access to a large number of government jobs, particularly in the higher grade levels. The disparity can be clearly seen in figures presented in a recent report released by the Civil Service Commission, *Minority Group Employment in the Federal Government* (1970). On the basis of the figures presented therein, the following listing shows the percentage of minority group employees under the General Schedule by grade level:

	Negro	Spanish-surnamed	American Indian	Oriental
GS-1 through GS-4	21.8	3.0	1.8	.6
GS-5 through GS-8	13.5	2.2	.7	.8
GS-9 through GS-11	5.1	1.5	.5	1.0
GS-12 through GS-13 ..	2.7	.8	.2	.9
GS-14 through GS-15 ..	1.7	.7	.2	.8
GS-16 through GS-18 ..	1.4	.3	.1	.2

Minorities represent 19.4% of the total employment in the Federal government (15.0% are Negroes, 2.9% are Spanish-surnamed, 0.7% are American Indians, and 0.8% are Oriental). Their concentration in the lower grade levels indicates that their ability to advance to the higher levels has been restricted. . . . Mrs. Daisy B. Fields, past president of Federally Employed Women (FEW), testified as to the distribution, by percent, of all women employed by the federal government (approximately 665,000 or about 34%) as represented by the following breakdown:

	Percent
GS-1 through GS-6	76.7
GS-7 through GS-12	21.7
GS-13 and above	1.7"

S. Rep. No. 92-415, 92nd Cong., 1st Sess., p. 13.

increased significantly.[5] Both the House[6] and Senate[7] committees concluded that a major cause of this continued discrimination was that aggrieved federal employees, unlike private employees covered by Title VII, did not have ready access to the courts. The Senate Committee noted in particular the practice of the Department of Justice of asserting sovereign immunity to prevent the courts from remedying discrimination on the basis of race or sex. Singled out in the hearings as obstructing such judicial relief on the grounds of sovereign immunity was the decision of the Eighth Circuit in *Gnotta* v. *United States*,

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[5] The percentage of federal employees who were women changed as follows:

	1966	1970	Difference
GS-13	4.0	4.5	+0.5
GS-14	3.5	3.6	+0.1
GS-15	2.4	3.3	+0.7
GS-16	1.8	1.8	0
GS-17	1.4	1.1	—0.3
GS-18	.8	1.3	+0.5
Above GS-18	1.9	1.3	—0.6

United States Civil Service Commission, Study of Employment of Women in the Federal Government, 1968, p.21, Table B; Federal Civilian Employment, Women, 1972 Study, p.12.

[6] "Despite the series of executive and administrative directives on equal employment opportunity, federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court review is available to the aggrieved federal employee." H. Rep. No. 92-238, 92nd Cong., 1st Sess., p. 25.

[7] "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved federal does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt." S. Rep. No. 92-415, 92nd Cong., 1st Sess., p. 16.

415 F.2d 1271 (8th Cir. 1969), cert. denied 397 U.S. 934.[8] The unavailability of judicial review was particularly serious because Congress concluded that the administrative grievance machinery for both procedural and substantive reasons had proved singularly ineffective in remedying discrimination.[9] To augment the inadequate judicial and administrative remedies which already existed to enforce the established prohibition against discrimination on the basis of race or sex in federal employment, Congress on March 24, 1972, enacted section 717(c) confirming in unequivocal language the right of federal employees to bring actions in the United States district courts to remedy such discrimination. *Morton* v. *Mancari*, 41 L.Ed.2d 290, 300 (1974).

Two and one half years after Congress disavowed the defense of sovereign immunity and the principles enunciated in *Gnotta* v. *United States*, the Department of Justice is persistently relying on sovereign immunity and *Gnotta* to restrict access to the federal courts. Since the enactment of section 717, as many as half of all the cases filed under that section have involved acts of discrimination which occurred prior to March 24, 1972. The government has maintained that none of these cases can be brought under section 717, arguing that that provision should only apply to discrimination occurring after that date. The government further maintains that any federal employee who was discriminated against before March 24, 1972, has no judicial remedy whatever. A majority of the courts to which this argument has been made have rejected it out

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[8] See Hearings on S.333 Before a Subcommittee of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970).

[9] H. Rep. No. 92-238, 92nd Cong., 1st Sess., pp. 24-26; S. Rep. No. 92-415, 92nd Cong., 1st Sess., pp. 14-17.

of hand. This is one of the few cases in which the government has prevailed.

The Sixth Circuit concluded that section 717(c) could not be applied to this case because of a "presumption" that, in the absence of a clear expression to the contrary, new statutes will not be applied to litigation pending on the date of their enactment and involving events transpiring prior to that date. P. 14a. The court incorrectly characterized such an application as "retroactive". See n. 13, *infra*. The Court of Appeals held the remedies of section 717(c) unavailable since Congress had not specifically provided that the provision would cover claims of discrimination occurring prior to, or pending before the Civil Service on, March 24, 1972. The Sixth Circuit also held that sovereign immunity and *Gnotta* v. *United States* precluded judicial relief in any case of employment discrimination not covered by section 717(c). P. 16a.

The decision of the Sixth Circuit is in square conflict with the decision of the Fourth Circuit Court of Appeals in *Koger* v. *Ball*, —— F.2d —— (4th Cir. 1974), 7 EPD ¶9360, pp. 19a-129a. In *Koger*, on facts virtually identical to those in the instant case, the Fourth Circuit held that section 717(c) must be applied to acts of discrimination occurring prior to March 24, 1972. Unlike the Sixth Circuit, which suggested section 717(c) involved "new rights", pp. 12a-15a, the Fourth Circuit held that section 717(c) was only an additional remedy.

> The legislative history establishes that the 1972 Act did not create a new substantive right for federal employees. The constitution, statutes, and executive orders previously granted them the right to work without racial discrimination. Section 717(c) simply created a new remedy for the enforcement of this existing right. P. 22a.

The Sixth Circuit held that a law was "presumed" not to apply to pending litigation involving prior events "unless there is a clear expression to the contrary", p. 14a, but the Fourth Circuit adopted the contrary rule

> Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment. . . . The general rule has been applied to cases affected by either the enlargement or the contraction of jurisdiction even though the causes of action arose before the enactment of the statutes that changed the court's jurisdiction. P. 23a.

The Sixth Circuit rejected as erroneous district court decisions applying 717(c) to prior discrimination in *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) and *Johnson* v. *Froehlke*, 5 EPD ¶8638 (D. Md. 1973), and followed instead the precedents to the contrary in *Mosley* v. *United States*, 6 EPD ¶8875 (S.D. Cal. 1973) and *Freeman* v. *Defense Construction Supply Center*, 5 EPD ¶8526 (S.D. Ohio). P. 16a. The Fourth Circuit expressly rejected *Mosley* and *Freeman* and followed the decisions in *Walker* and *Johnson*. P. 18a, n. 2.

The decision of the Sixth Circuit is also in conflict with at least twelve district court decisions holding that the provisions of section 717(c) apply to discrimination occurring prior to March 24, 1972. *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) expressly adopted the rule of construction rejected by the Sixth Circuit:

> The 1972 Act is clearly remedial. The Act fits the classic definition of legislation which affords a remedy or facilitates remedies already existing for the enforcement of rights and redress of injuries . . . The general rule of construction is that a remedial statute shall be so construed as to make it effect its evident purpose

> and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied.

357 F.Supp. at 751. See also *Harrison* v. *Butz*, 5 EPD ¶8632 (D.D.C. 1973); *Jackson* v. *United States Civil Service Commission*, 7 EPD ¶9134 (S.D. Tex. 1973). In *Johnson* v. *Lybecker*, 7 EPD ¶9191 (D. Ore. 1974) and *Henderson* v. *Defense Contract Administration*, 7 EPD ¶9058 (S.D. N.Y. 1973), the district courts argued, as did the Fourth Circuit later in *Koger*, that section 717(c) did not create a new substantive right, but merely a new remedy.

> Federal employees had a right to be free from job discrimination long before the passage of the 1972 Act. *Walker* v. *Kleindienst, supra.* They also had various available remedies. Prior to the effective date of the 1972 Act, federal employees were held to have remedies in the federal courts under 28 U.S.C. §1346(a), and the Administrative Procedure Act 5 U.S.C. §702. . . . Relief, however, was limited under those remedies. The Equal Employment Opportunity Act of 1972 was intended to provide additional remedies for employees subject to job discrimination.

Johnson v. *Lybecker*, 7 EPD p. 6978. See also *Pointer* v. *Sampson*, 5 EPD ¶8610 (D.D.C. 1973); *Johnson* v. *Froehlke*, 5 EPD ¶8638 (D. Md. 1973); *Fears* v. *Catlin*, 7 EPD ¶9135 (D. Colo. 1974); *Ficklin* v. *Sabatini*, 7 EPD ¶9307 (E.D. Pa. 1974); *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973); *Gautier* v. *Weinberger*, 6 EPD ¶9001 (D.D.C. 1973); *Grubbs* v. *Butz*, 6 EPD ¶8763 (D.D.C. 1973).

The conflict between the Fourth and Sixth Circuits regarding section 717(c) is reflected in a similar conflict among the district courts. Although most of the district

courts have concluded that section 717(c) should be applied to discrimination prior to its effective date, a minority have reached the opposite conclusion. In *Jones* v. *United States*, 7 EPD ¶3982 (D.D.C. 1974), the district court held, in contrast to *Koger*, that new statutes were presumed not to apply to litigation pending on then effective dates. In *Hill-Vincent* v. *Richardson*, 359 F.Supp. 308 (N.D. Ill. 1973) the district court concluded section 717(c) could not apply to prior discrimination because, unlike section 14 of the 1972 Act, there was no express provision authorizing such application. This same argument was considered and rejected by the Fourth Circuit in *Koger* v. *Ball*, pp. 26a-27a. See also *Palmer* v. *Rogers*, 6 EPD ¶8822 (D.D.C. 1973); *Mosley* v. *United States*, 7 EPD ¶8875 (S.D. Cal. 1973); *Feiger* v. *Warner*, 7 EPD ¶9140 (S.D. Cal. 1974); *Nimitz* v. *Berzak*, 7 EPD ¶9273 (E.D. La. 1974). Within the last year the district courts have repeatedly noted the existence of this widespread conflict. See *Harrison* v. *Butz*, 5 EPD ¶8832 (D.D.C. 1973); *Jackson* v. *United States Civil Service Commission*, 7 EPD ¶9134 (S.D. Tex. 1973); *Fears* v. *Catlin*, 7 EPD ¶9135 (D. Colo. 1974); *Johnson* v. *Lybecker*, 7 EPD ¶9191 (D. Ore. 1974); *Palmer* v. *Rogers*, 6 EPD ¶8822 (D.D.C. 1973); *Jones* v. *United States*, 7 EPD ¶9382 (D.D.C. 1974); *Johnson* v. *University of Pittsburgh*, 359 F.Supp. 1002 (W.D. Pa. 1973).

Insofar as the Sixth Circuit held there is no cause of action outside of section 717(c) to remedy Federal employment discrimination, the decision below was in clear conflict with the decisions of the Fifth Circuit and the Court of Claims. The Court below noted that while the Eighth Circuit had disallowed civil actions to enforce Executive Order 11478 in *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied* 397 U.S. 934, the Court of Claims had reached the contrary result in *Chambers* v.

United States, 451 F.2d 1045 (Ct. Cl. 1971). See also *Pettit* v. *United States*, —— F.2d ——, 6 EPD ¶9036 (Ct. Cl. 1973). See pp. 16a, 17a. The Sixth Circuit, conceding that *Gnotta* and *Chambers* were "irreconcilably in conflict", decided to follow the reasoning of *Gnotta* and the dissenters in *Chambers*. P. 17a.[10] The Court of Claims in *Chambers* declined to follow *Gnotta*, and the dissenting opinions in *Chambers* and *Pettit* pointed out that the majority's opinions were in "direct conflict with *Gnotta*." 451 F.2d at 1081; 6 EPD pp. 6348, 6354-55.

Similarly, although the Sixth Circuit concluded that no civil actions could be maintained other than under section 717(c) to remedy unlawful federal employment discrimination, the Fifth Circuit has on three occasions held that the remedy of mandamus may be invoked when section 717(c) does not afford a remedy. In *Beale* v. *Blount*, 461 F.2d 1133 (5th Cir. 1972), the Fifth Circuit held

> Traditionally, the procedural avenue to reinstatement for an ex-employee of the federal government claiming to be the victim of improper discharge has been a petition for mandatory injunction or writ of mandamus directed to the head of the agency concerned commanding the re-employment of petitioner. . . . In 1962, Congress broadened the availability of the mandamus remedy by investing the district courts generally with jurisdiction to issue the writ which eliminated the previous requirement that reinstatement suits be maintained only in the United States District Court for

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[10] The District Court and the United States below agreed that *Gnotta* and *Chambers* were in conflict. See p. 8a; Brief for Appellee, *Place* v. *Weinberger*, No. 73-2037, p. 7.

> the District of Columbia . . . Title 28 U.S.C., Section 1361. 461 F.2d at 1137.[11]

The Fifth Circuit reaffirmed the availability of mandamus in such cases in *Penn* v. *Schlesinger,* 490 F.2d 700 (5th Cir. 1973), rev'd on other grounds —— F.2d —— (1974), and *Petterway* v. *Veterans Administration,* 8 EPD ¶9437 (1974). The decision of the Sixth Circuit below is in undisputed conflict with *Chambers* v. *United States,* as well as *Pettit* v. *United States, Beale* v. *Blount,* and *Penn* v. *Schlesinger.* Conflicts between a court of appeals and the Court of Claims, like conflicts between courts of appeals, require a grant of writ of certiorari to assure uniformity of decisions in such questions of federal law. See *Waterman S.S. Corp.* v. *United States,* 381 U.S. 252, 258 (1965); *United States* v. *Consolidated Edison Co.,* 366 U.S. 380, 381 (1961).[12] This question is one of continuing importance, since in the future aggrieved federal employees who cannot meet the strict jurisdictional prerequisites of section 717 will seek, as in *Chambers* and *Penn,* to found their actions on other statutes. See e.g. *Brown* v. *General Services Administration,* (2d Cir., No. 73-2628). Although Title VII was enacted to cover private employers a decade ago, employees still rely frequently on such other statutes in employment discrimination litigation.[13]

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[11] Mandamus was denied in *Beale* because the plaintiff had failed to exhaust his administrative remedies. 461 F.2d at 1138-1141. In the instant case, of course, those remedies were exhausted.

[12] The decision of the District Court expressly "declines to follow" the Fifth Circuit decision in *Penn,* p. 8a. Insofar as the decision of the Sixth Circuit held that no judicial remedy exists other than section 717(c) to correct federal employment discrimination, it is in conflict with a variety of district court cases to the contrary. See e.g., *Thorn* v. *Richardson,* 4 EPD ¶7630 (W.D. Wash. 1971) (mandamus); *Palmer* v. *Rogers,* 5 EPD ¶8822 (D.D.C. 1973) (Tucker Act; 28 U.S.C. §1331); *Cortright* v. *Reasor,* 325 F.Supp. 797, 808 (E.D.N.Y. 1971) (28 U.S.C. §1331).

[13] See, e.g., *Sanders* v. *Dobbs Houses, Inc.,* 431 F.2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *Young* v. *Inter-*

The decision of the Sixth Circuit is also squarely in conflict with the decision of this Court last term in *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed.2d 476 (May 15, 1974). *Bradley* dealt with the applicability of a new provision authorizing legal fees in school desegregation litigation to cases in which litigation on the merits had ended before enactment of the new statute, but the question of legal fees for that litigation was still pending when the statute became effective. The respondent in *Bradley*, like the Sixth Circuit in the instant case, urged that new statutes should not be applied to events occurring before their enactment absent an express requirement, and that legal fees should not be awarded for litigation completed prior to the effective date of the counsel fee statute.[14] This Court unanimously rejected that approach:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it consider its decision, unless doing so would result in manifest injustice or there is a statutory legislative history to the contrary. 40 L.Ed.2d at 488

Referring to its earlier decision in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969), this Court explained that *Thorpe*

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national Telephone and Telegraph Co., 438 F.2d 737 (3d Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied* 409 U.S. 982 (1973); *Brady* v. *Bristol Myers*, 452 F.2d 621 (8th Cir. 1972); *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970).

[14] The Sixth Circuit held "a law is presumed to operate prospectively unless there is a clear expression to the contrary". P. —a. The respondents in *Bradley* had urged, "the general rule that legislative enactments only operate prospectively absent clear legislative intent to the contrary cannot be seriously questioned." Brief for Respondents, No. 72-2322, p. 10. This use of the term "prospectively" is somewhat inaccurate, since a statute is only "retro-

> stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect. Accordingly we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. 40 L.Ed.2d 490

In applying section 717(c) to discrimination prior to March 24, 1972, the Fourth Circuit in *Koger* v. *Ball*, p. 23a, nn. 14-15 and several district courts have expressly relied on *Thorpe*.[15]

In the instant case the new statute, §717(c), was enacted while petitioner's claim was still pending before the Civil Service Commission Board of Appeals and Review. Having exhausted her administrative remedies, petitioner complied with all the express jurisdictional prerequisites of §717 and commenced this action six months after the statute was enacted. In *Bradley*, by comparison, the litigation for which counsel fees were sought was completed over a year before the new statute went into effect. No claim is or could be made that applying section 717 to the instant case will work any injustice upon the United States.[16] Here, as in

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active" if applied to reopen cases already finally decided. See *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *Bradley* v. *School Board of The City of Richmond*, 40 L.Ed.2d at 487-88.

[15] *Walker* v. *Kleindienst*, 357 F.Supp. 749, 752 (D.D.C. 1973); *Harrison* v. *Butz*, 5 EPD ¶8632, p. 7892 (D.D.C. 1973); *Jackson* v. *United States Civil Service Commission*, 7 EPD §9134 (S.D. Tex. 1973).

[16] The Sixth Circuit relied on this Court's decision in *Hassett* v. *Welch*, 303 U.S. 303 (1938) for its contention that new statutes should be presumed inapplicable to previously pending litigation. In *United States* v. *Lindsay*, 346 U.S. 568, 571 (1954), this Court explained that *Hassett* was an exception to the rule later reiterated in *Thorpe* and *Bradley* because it involved "particular provisions

Bradley, the legal obligations of the defendants were clear long prior to the new enactment. "The 1972 extension of the Civil Rights Act to government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which had previously existed." *Morton* v. *Mancari*, 41 L.Ed.2d 290, 300 (1974).

The position of the Department of Justice on this question has not been uniform. In the Sixth Circuit the Government argued that section 717(c) did not apply to prior actions of discrimination. In the Second Circuit, however, the United States maintains that section 717(c) does apply to such prior discrimination.[17] In the Fourth Circuit the United States argued that section 717(c) did not apply to discrimination occurring before its effective date, but when the Court of Appeals rejected that position in *Koger* v. *Ball*, the Solicitor General declined to authorize an appeal to this Court. Similarly, the United States now argues that, prior to the 1972 amendments to Title VII, federal employees aggrieved by discrimination had no right to sue in federal court for injunctive relief or back pay. But

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. . . deemed so inequitable and unfair when applied retroactively [sic] that this Court has refused to impute to law making bodies a purpose to bring about such results". Compare *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed.2d at 491-494.

[17] "This argument presumes that the Act applies in the present case as where the complaint, while alleging discrimination occurring before passage of the Act, was filed after the Act became effective. *Hackley* v. *Johnson*, 360 F.Supp. 1247, 1249, n.1 (D.C. 1973), appeal docketed; *Henderson* v. *Defense Contract Administration Services Region*, 7 EPD ¶9058 (S.D.N.Y. 1974), have so held." Brief for the United States in *Brown* v. *General Services Administration*, No. 73-2628, p. 6, n.

in 1971, when Congress was considering enacting legislation to permit such litigation, federal officials repeatedly assured Congress that federal employees already had such a right to sue and that new legislation was unnecessary.[18] Although the United States in the courts below relied heavily on the Eighth Circuit decision in *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied* 397 U.S. 934 (1970), the Civil Service Commission advised Congress that *Gnotta* did not preclude "judicial review of alleged

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[18] "There is also little question in our mind that a Federal employee who believes he has been discriminated against may take his case to the Federal courts after exhausting all of the administrative remedies." Remarks of Irving Kator, Executive Director, United States Civil Service Commission, Hearings Before a Subcommittee of the Senate Committee on Labor & Public Welfare, 92 Cong., 1st Sess. 301 (1971) p. 296. "We believe Federal Employees now have the opportunity for court review of allegations of discrimination, and believe they should have such a right." Id. p. 310, written statement on behalf of the United States Civil Service Commission.

"[T]o some extent injunctive remedies are already available. The constitutionality of any program can be challenged. The authority within the program of an official to act can be challenged." "[T]here is no doubt that a court today may look into unauthorized or unconstitutional agency action . . ." (Remarks of Assistant Attorney General Ruckleshaus) Hearings Before a Subcommittee of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970), pp. 69, 74, 256-257.

In a variety of district court cases the Justice Department has declined to contest the existence of such jurisdiction under provisions other than §717(c). See e.g., *Ballard* v. *Laird*, 6 EPD ¶8793 (S.D. Cal. 1973) (28 U.S.C. §1331); *Jalil* v. *Hampton*, 4 EPD ¶7706 (D.D.C. 1972) (28 U.S.C. §1331); *Sperling* v. *United States*, 7 EPD ¶9274 (D.N.J. 1974) (Tucker Act, 28 U.S.C. §1346); *Waters* v. *Peterson*, 6 EPD ¶8900 (D.D.C. 1973) (Tucker Act, 28 U.S.C. §1346; 28 U.S.C. §1331). The Solicitor General, in federal employment litigation in this Court regarding alleged violations of the Constitution, *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Williams* v. *Zuckert*, 371 U.S. 531 (1963), statutes, *Cole* v. *Young*, 351 U.S. 536 (1956) and regulations, *Service* v. *Dulles*, 354 U.S. 363 (1957), has also declined on repeated occasions to contest the jurisdiction of the Court.

discriminatory action." Hearings Before the Subcommittee on Labor of the House Committee on Education and Labor, 92nd Cong., 1st Sess. 386 (1971). Although the Court of Claims has twice asserted jurisdiction over federal employment discrimination despite *Gnotta,* the Solicitor General declined to seek review of those decisions by this Court. See *Chambers* v. *United States,* 451 F.2d 1045 (Ct. Cl. 1971); *Pettit* v. *United States,* 6 EPD ¶9036 (Ct. Cl. 1973).

At stake in this litigation is the efficacy of the judicial remedy which Congress sought to create when it enacted section 717 to eradicate discrimination on the basis of race or sex. It is now 7 years since petitioner was last promoted, 3 years since petitioner filed her administrative complaint, and over two years since Congress adopted section 717. Throughout this period discrimination on the basis of sex has been indisputably illegal. Because this case, as most, involves continuing acts of discrimination, the Sixth Circuit suggested that petitioner's sole remedy was to recommence at the very beginning her administrative complaint, bringing the same charges to the same supervisors, hearing officer and Board of Appeals and Review which rejected them in 1971 and 1972. Only when those administrative remedies have been re-exhausted will petitioner, and other plaintiffs similiarly situated, be eligible to seek judicial relief. Such a construction of section 717 is more likely to exhaust aggrieved employees than to carry out the purposes of the Equal Employment Opportunity Act of 1972. The Congress which adopted that provision was concerned, not only to afford a judicial remedy, but also to end the interminable delays which had characterized such remedies as had existed before 1972.[19]

[19] See Hearings Before a Subcommittee of the House Committee on Education and Labor, 91st Cong., 1st and 2nd Sess., 111-112,

Congress was insistent on adopting new remedies, despite the objections of the executive branch, because six years after it had adopted section 7151 forbidding discrimination in federal employment, few steps had been taken to disestablish the pattern of discrimination which existed in the federal service. Congress made the 1972 Equal Employment Opportunity Act effective as soon as approved, and contemplated that its salutary provisions which have an immediate impact on the problems of discrimination. The rule adopted by the Sixth Circuit—delaying application of section 717 until there are new acts of discrimination, and a new effort to exhaust administrative proceedings—will necessarily postpone for several years the effect of that provision and thus postpone the elimination of discrimination on the basis of race or sex in federal employment.

The decision of the Sixth Circuit also severely limits the power of the federal courts to remedy continuing acts of discrimination. Although an aggrieved employee could sue if that discrimination continued past the effective date of section 717, the rule adopted by the Sixth Circuit would prevent the employee from obtaining back pay for the wages unlawfully denied to him or her prior to March 24, 1972. Similarly, while the courts could usually order that an aggrieved employee be accorded the seniority which he or she would have had in the absence of discrimination, in the Sixth Circuit a federal employee cannot be deemed to have been hired or promoted before March 24, 1972, even though the unlawful discrimination may have occurred years before. The number of years a federal employee is deemed to have in grade determines the employee's salary,

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118, 147-149, 157, 176-180, 238-240 (1969-70). Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess., 206, 212, 276 (1971).

5 U.S.C. §§5332, 5335, the employee's right to a career appointment, 5 U.S.C. §3304a, the employee's right to retain his or previous salary if reduced in grade, 5 U.S.C. §5337, and the level of the employee's retirement annuity life insurance, and unemployment compensation. 5 U.S.C. §§8339, 8341, 8501, 8704. The date on which a federal employee is deemed to have been hired determines the employee's rights in the event of a layoff, 5 U.S.C. §3502, the amount of the employee's annual leave, 5 U.S.C. §6303, and the employee's eligibility for an annuity and disability retirement. 5 U.S.C. §§8336, 8337. If, as the Sixth Circuit has held, the courts cannot remedy discrimination occurring before March 24, 1974, employees like petitioner who were subject to discrimination before that date will continue to suffer from the effects of that discrimination for the rest of their careers in the federal service.

Petitioner maintains that jurisdiction over this action exists under section 717(c) of Title VII, as well as under 28 U.S.C. §1331, 28 U.S.C. §1346, 28 U.S.C. §1361 and the Administrative Procedure Act, 5 U.S.C. §§703-706, and that the decision of the Sixth Circuit was clearly erroneous. Although the instant case is one involving discrimination on the basis of sex, the decision of the Sixth Circuit, like that revised in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), will also impede the eradication from federal employment of discrimination on the basis of race, color, religion or national origin.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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